

CPS-143

February 17, 2005

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. 05-1470

IN RE: HOWARD A. BURKE

Present: ALITO, MCKEE AND AMBRO, CIRCUIT JUDGES

Submitted is Petitioner's application pursuant to 28 U.S.C. § 2244 and § 2255 to file a second or successive motion under 28 U.S.C. § 2255

in the above-captioned case.

Respectfully,

Clerk

MMW/RPC/sma

ORDER

The foregoing application to file a second or successive motion under 28 U.S.C. § 2255 is denied. Petitioner's ineffective counsel claim does not assert newly discovered evidence related to the guilt phase of the proceedings, see 28 U.S.C. § 2255 ¶ 8(1); In re Dean, 341 F.3d 1247, 1249 (11th Cir. 2003) ("newly discovered evidence exception . . . does not apply to claims asserting sentencing error"), and to the extent Petitioner is relying on Apprendi v. New Jersey, 530 U.S. 466 (2000), the decision was not "previously unavailable" to Petitioner at the time of his sentencing, see 28 U.S.C. § 2255 ¶ 8(2). Petitioner's claims under Blakely v. Washington, 124 S. Ct. 2531 (2004) and United States v. Booker, 125 S. Ct. 738 (2005) are not based on a new rule made retroactive by the Supreme Court. See Tyler v. Cain, 533 U.S. 656, 662 (2001).

By the Court,

/s/ Theodore A. McKee
Circuit Judge

Dated: March 4, 2005

SMA:CC:TO: : LAZ

JLM True Copy:

Marcia M. Waldron

Marcia M. Waldron,
Clerk

FILED
HARRISBURG, PA

MAR 11 2005

MARY E. D'ANDREA, CLERK
Per Deputy Clerk

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